

CANADA / JUDGMENT

Zaffaroni v. Bekes

2023 BCSC 1699

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1699 Zaffaroni v. Bekes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zaffaroni v. Bekes,

2023 BCSC 1699

Date: 20230928

Docket: E-211923

Registry: Victoria

Between:

Irene Genevieve Marie Zaffaroni

Plaintiff

And:

Andrew Barton Csaba Dean Bekes

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Plaintiff:

J. Horton

Counsel for the Defendant:

S. Tradewell

Place and Date of Hearing:

Victoria, B.C.

May 10 and 11, 2023

Place and Date of Judgment:

Victoria, B.C.

September 28, 2023

Introduction

- [1] There are two issues in this family law proceeding: whether there are grounds to set a separation agreement aside, and if so, what relief should be ordered.
- [2] Each party brings an application. The plaintiff seeks production of specific documents, including documents from the following third parties: AGB Properties Ltd. ("AGB") and Gabriella Maria Bekes, in her personal capacity, in her capacity as trustee of the Bekes Family Trust (the "Trust") and in her capacity as trustee of the Albert Bekes Joint Spousal Trust (the "Affected Parties"). The plaintiff also seeks an order for further discovery of the defendant.
- [3] The defendant seeks an order that the trial of this matter be severed to first address the enforceability of the parties' separation agreement.
- [4] The Affected Parties have filed a response taking no position regarding the two orders sought against them for production. The other orders sought do not engage their interests. They request that if the settlement agreement relating to British Columbia Supreme Court Action No. S189270, Vancouver Registry, *Bekes v. Bekes* (the "Bekes Litigation") (between the defendant and AGB and Gabriella Maria Bekes in her capacities as trustee of the two trusts and in her personal capacity), is ordered to be produced, it remains confidential and only to be used only for the purposes of this litigation. Counsel for AGB and Gabriella Maria Bekes did not attend the hearing of the applications.

Background

- [5] The parties began cohabiting on January 1, 1987 and were married in Victoria, British Columbia on August 22, 1987. They separated on February 15, 2016 and were divorced on January 6, 2017.

- [6] On May 10, 2017, they entered into a separation agreement (the "Separation Agreement") resolving all family issues between them. Both parties were represented by counsel. Negotiations were extensive. Both parties provided financial disclosure and worked with an accountant throughout the negotiation process. Once the settlement was agreed to in principle, the parties' negotiation of the language of the Separation Agreement took five months.
- [7] The plaintiff signed the Separation Agreement on May 10, 2017, and the defendant signed on May 19, 2017.
- [8] On June 17, 2021, the plaintiff filed the notice of family claim to set aside the Separation Agreement. She seeks spousal support and division of family property.
- [9] Trial is set for nine days beginning October 7, 2024.
- [10] The parties have two children, now adults. During the marriage the plaintiff cared for the children and the household. The defendant was employed by his family business owned by his late father and his stepmother Gabriella Maria Bekes, which business later became Bekes Holdings Ltd. in 1997 when the Trust was established. The Trust originally owned one apartment building, Albion Court Apartments in Victoria. Bekes Holdings Ltd. was renamed AGB Properties Ltd. in July 2001. AGB acquired two more apartment buildings and three houses, also in Victoria, and a flat in London, England. At that time, Albert Bekes and Gabriella Bekes were the sole directors of AGB. The defendant, and later the plaintiff, managed the day-to-day operations of the properties including collecting rent and managing building repairs. After Albert Bekes died in April 2004, the parties continued to work for AGB under the direction of Gabriella Bekes until their employment with AGB was terminated on March 14, 2016.
- [11] At some point the assets of AGB were transferred to the Trust as part of Albert Bekes' and Gabriella Bekes' estate and tax planning.

The Separation Agreement

- [12] At separation, the plaintiff received assets totalling approximately \$534,247 plus her RRSP and remained responsible for debts of approximately \$25,500. The defendant retained assets of approximately \$34,500, his RRSP and responsibility for debts totalling about \$119,717.10 plus an alleged debt to his mother of \$120,000 which was disputed by the plaintiff. The Separation Agreement in its recitals addressed that alleged debt:

Andrew is named as a defendant in a civil action filed in the British Columbia Supreme Court, Victoria Registry under court file number 16 3326 regarding monies advanced, \$120,000.00, during the parties' relationship by Andrew's mother, Irene Schien (the "Schien Litigation"). Irene [Zaffaroni] has been named as a Third Party in the Schien Litigation.

[13] The Separation Agreement also acknowledged the Trust was discretionary and included a letter from the trustee, Gabriella Bekes (the "Trustee"), dated September 30, 2016 to the defendant confirming that she controlled the Trust absolutely. In the letter, the Trustee stated that a direction she had signed under the trust deed provided that no distribution of any income or capital would be made to the defendant on her death. The defendant represented to the plaintiff that he had no interest in AGB or the Trust.

[14] In reliance on that information and the defendant's representation, an unequal division was agreed to in return for the plaintiff releasing any interest she might have in the Trust. The Separation Agreement stated:

4.9 Upon fulfillment by Andrew of his obligations under paragraph 4.1 of this Agreement, and in consideration for the division of property and debt in this Agreement, Andrew will retain, and Irene will waive, any interest he or she may have in the Trust and any increase or decrease in value of that interest.

[15] In or around September 2018, the plaintiff learned the defendant had filed a notice of civil claim against AGB, the Trust and the Trustee, which initiated the Bekes Litigation. The defendant claimed his late father had promised him a 50 percent interest in AGB and the Trust. He advanced a claim for unjust enrichment. It has since been revealed that he had been advancing a claim as a beneficiary of the Trust against the Trust in correspondence with the Trustee since 2016. In a letter to the Trustee dated June 8, 2018, he referred to having been waiting for over two years to discuss "family matters" with her stating:

My father "Bela" was the patriarch of the family and entrusted you, Gabi Neni, with the responsibility of overseeing the family and ensuring the strength and the continuance of the family. He made you the matriarch of the Bekes Family and trust. He promised me and so did you that I could trust you to be fair and take care of myself and the children after he was gone, that was the purpose of the Trust.

[16] The notice of civil claim was filed August 23, 2018 in the British Columbia Supreme Court, Vancouver Registry. It alleges that on or about July 16, 1997, the Bekes Family Trust was established by the defendant's father and the Trustee as initial trustees, The beneficiaries were the defendant, his two children and the Trustee. Upon his father's death, the Trustee became the sole trustee.

[17] The claim was settled for an unknown amount. The defendant claims the settlement is privileged and refuses to reveal the details. The Trustee deposes she settled the lawsuit with the defendant because she was 80 years of age, had high blood pressure and was in danger of having a stroke and could not tolerate the stress of a trial.

- [18] Subsequently, the plaintiff also learned the defendant had received \$250,000 from the Trustee on May 15, 2017, five days after the plaintiff signed the Separation Agreement and four days before the defendant signed. She alleges the defendant had told the Trustee he needed the \$250,000 to settle his family law claim with the plaintiff and that the Trustee agreed to provide the funds on the understanding the funds were to be given to the plaintiff. The plaintiff did not receive the funds.
- [19] In his pleadings in the Bekes Litigation, the defendant describes the promise forming the basis for his claim as follows:
32. Beginning in 1995 and continuing until his death, Dad by his words and conduct repeatedly assured and promised Andrew that (the "Promise"):
 - (a) Dad was grooming Andrew to take over the Family Business;
 - (b) Andrew was entitled to a management role at and salary from the Family Business until Andrew wished to retire; and
 - (c) after Dad's death, Andrew would receive 50% of the shares in the Family Business upon the earlier of (the "Triggering Event"):
 - (i) the date of Gabriella's death; and
 - (ii) the date on which Andrew requested that Gabriella transfer 50% of the shares in the Family Business to Andrew.
 33. In reliance on the Promise, Andrew sacrificed his ambition to pursue a career in information technology in order to assist his Dad by working for the Family Business for over 20 years, contributing to an increase in the value of the Family Business.
 34. Beginning in 1995, Andrew was a dutiful employee of the Family Business. From the outset, Andrew assumed a management role and was instrumental to the success of the Family Business.
 35. Andrew's role in the Family Business increased rapidly. By 1997, Andrew was primarily responsible for managing the Family Business, although he consulted with his Dad and Gabriella on major decisions.
 36. With Andrew's assistance, the Family Business grew and prospered.
- [20] He pled he continued in that role after his father's death.
- [21] He pled as well that under the terms of a secret trust he was to receive 50 percent of the shares of the family business.
- [22] When examined for discovery in this proceeding he was asked: "Were all of those claims at paragraph 32 true", to which he replied "No." He stated regarding paragraph 32(c) he "was never given any assurance that this would transpire."

- [23] The plaintiff submits throughout their marriage it was understood that they would receive 50 percent of AGB, which she alleges was valued at approximately \$32,000,000 in 2017. She was told by the defendant during their relationship that he would inherit 50 percent and that their future was secure. She states as an only child it was understood he would eventually inherit from the Trust. However, when the Trustee advised she would not exercise her discretion in favour of the defendant, that significantly affected the plaintiff's decision to sign the Separation Agreement. As for the \$250,000 from the Trustee, she was not aware of its existence nor that it was intended for her, and she alleges the defendant's retention of the funds and failure to reveal them was an act of deceit.
- [24] She notes that the Trustee deposed in her affidavit that in November 2016 the defendant approached her and told her he needed money to pay out the plaintiff, and when she asked him how much, he told her he had to pay \$250,000 to the plaintiff. She informed him she would provide the sum, but it would have to wait until she sold the apartment buildings. That occurred in April 2017, at which time she informed the defendant she did not believe the plaintiff would take funds from her. The defendant suggested she transfer the funds to his mother Irene Schien, which she did. Subsequently, the defendant told the Trustee he had paid the plaintiff \$243,000 and she told him to keep the remaining \$7,000.
- [25] The Trustee deposed that a year later she asked the plaintiff about the money she received from the defendant and was informed by the plaintiff she had not received the funds. The Trustee states in her affidavit that she told the plaintiff "he did it to me again". She deposed she would not have provided the \$250,000 had she known the defendant did not intend to give it to the plaintiff.
- [26] The plaintiff submits the defendant is not credible and has a pattern of contradicting his own statements. For example, the defendant stated during his discovery that the claims he made in Bekes Litigation were not true. A notice of civil claim must provide a concise statement of the material facts giving rise to the claim: Supreme Court Civil Rules, R. 3-1(2) (a). They are the basis for the claim and the relief sought. Although not under oath, it is implicit that a party will advance facts they believe are true and they believe they can prove.
- [27] The plaintiff submits she would not have signed the Separation Agreement had she been aware of the \$250,000 received by the defendant and the defendant's intentions to pursue a claim against the Trust. She further alleges the defendant took advantage of her vulnerability and that in light of the overall circumstances the Separation Agreement's division of property was significantly unfair.
- [28] The defendant is now the owner of various corporate interests owning revenue property in Victoria, a condominium in Phoenix, Arizona, a newly renovated home in Oak Bay and significant investment accounts.

- [29] He submits the "plaintiff is sophisticated and intelligent, and entered into the Separation Agreement on her own free will, with full knowledge of her rights to seek disclosure, and on the advice of her own independent counsel, being the current counsel who continues to represent Ms. Zaffaroni in these proceedings." The defendant further submits that the Separation Agreement's unequal division of property in the plaintiff's favour demonstrates that the Separation Agreement was fairly negotiated.
- [30] I turn first to the defendant's application to sever the trial of the issue of the enforceability of the Separation Agreement.

Application to Sever

- [31] The defendant submits a determination of whether the Separation Agreement is enforceable will dispose of the need to address the property and support relief sought, saving time and expense for both parties and the Court, and ending the need for further disclosure and trial. The defendant further submits doing so is consistent with the overall purpose of the Supreme Court Family Rules to facilitate the fair, just, speedy and inexpensive determination of every family law case on its merits: R. 1-3.
- [32] Pursuant to R. 14-6(2), the Court may order one or more questions of fact or law be tried and determined before others. The defendant submits that doing so in this instance best serves the interests of justice.
- [33] In *K.M.W. v. M.D.W.*, 2016 BCSC 228, in a summary trial hearing the issue of severing issues under R. 14-6(2) was addressed. Justice Rogers summarized the law:
37. The B.C. Court of Appeal considered the question of severance in *Ross River Dena Council v. Canada (Attorney General)*, 2013 YKCA 6. The issue arose out of the Rules of Court for the Yukon Court. The relevant portion of those Rules was identical to the equivalent provision in the B.C. Rules. Writing for the Court, Groberman J.A., said:
- [15] Rule 41(18) came into force in 2008. It is, however, identical to its predecessor, former British Columbia Rule 39(29). The purpose of the Rule is to allow proceedings to be tried efficiently. Where a particular issue of fact or law can be determined independently of other issues, its early resolution may obviate the need for protracted proceedings, either because it is decisive of the litigation, or because it encourages the parties to settle the remaining issues.
- [16] An order under Rule 41(18) is discretionary. Unless the judge has erred in principle or exercised discretion on an improper basis, this Court will not interfere with such an order: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2008 BCCA 107.
- [18] In *Nguyen v. Bains*, 2001 BCSC 1130, Martinson J. summarized some of the jurisprudence under former British Columbia Rule 39(29):

- [11] Courts have considered the question of when some issues should be tried before others. These are some of the points that have been made:
- a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
 - b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
 - c. Severance is most appropriate when the trial is by judge alone.
 - d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
 - e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
 - f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.
- [19] Other cases suggest that severance of issues under former Rule 39(29) might be confined to "extraordinary or exceptional cases": see, for example, *Hynes v. Westfair Foods Ltd.*, 2008 BCSC 637 at para. 33.
- [20] In my view, the jurisprudence that has developed in respect of the severance of issues for summary trial is generally applicable to the severance of issues under Rule 41(18).
- [21] In general, the jurisprudence suggests a cautious approach to the severance of issues. Issues should only be severed where it appears that efficiencies will result from having one issue determined in advance of others. Cases in which severance of an issue is appropriate are the exception rather than the rule.
- [22] In order for an issue to be suitable for severance, it must be capable of being decided independently of other issues. An issue that is inextricably intertwined with others will not be suitable for separate determination (*Prevost v. Vetter*, 2002 BCCA 202).
- [23] The mere fact that an issue can be determined independently of others, however, will not be sufficient to justify its severance. Courts must be conscious of their role in the orderly development of the law, and should not precipitously enter upon consideration of difficult legal issues where the litigation might be resolved on more mundane principles (*Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138).

- [25] There are cases in which it will be efficient to sever off issues for early determination. Specific defences may lend themselves to early and separate determination -- for example, the question of whether a limitation period has run, or the question of whether a matter is *res judicata*. There may also be cases in which issues of liability and quantum of damages can be severed from one another, though I do not suggest that such severance will often be appropriate.
- [26] Rule 1(8) mandates active case management, and encourages the case management judge to consider whether it is appropriate to sever issues for early determination. In my view, however, it does not lessen the need for the court to proceed cautiously, and to refuse severance where the issue under consideration is too closely connected with other issues to be decided independently, or where severance will not further the objects of the rules.
38. In *Jones-Hannem v. Hannem*, 2012 BCSC 1649, I was asked to sever certain issues in a family proceeding. In refusing the application, I wrote:
- [2] It is generally undesirable to split issues in a proceeding - doing so risks "litigating in slices", as the B.C. Court of Appeal has described it in numerous decisions, see for example: *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, [2002] B.C.J. No. 377. That said, the court will permit issues to be severed if doing so best serves the interests of justice. In divorce proceedings, the commonly accepted reasons to grant a divorce ahead of a final determination of the rest of the family issues include, firstly, the proposition that the end of the marriage relationship may remove an emotional roadblock to progress and thus spur the parties to resolve the remaining issues and, secondly, one party needs a divorce in order to remarry or to take some other step in life.
- [34] The defendant relies on *Hudema v. Moore*, 2020 BCSC 1502, asserting it is directly on point. In *Hudema*, the dispute centered on the nature of the parties' relationship. The claimant commenced a family law proceeding alleging they were in a marriage-like relationship for several years. The respondent stated they were landlord and tenant for several years and then in a dating relationship. The respondent claimed they had signed an agreement that confirmed they were not in a marriage-like relationship. The respondent applied to sever the issue of the validity and enforceability of the agreement from all other issues between the parties. Severance was ordered by Justice W.A. Baker:
- [16] Further, I am satisfied that a determination of the enforceability of the agreement can be made fairly absent the other claims advanced by the plaintiff, and that the determination of the enforceability of the agreement will materially advance this litigation. Determination of this question will either finally determine the litigation, or will encourage the parties to settle the remaining issues.
- [17] If a further trial is necessary, it will be much shorter than 10 days and the parties may be able to find a date sooner than if the trial is to be reset for 10 days. At most, five days of trial time will be required to determine the enforceability of the agreement and my sense, after reviewing the issues, is that less than five days will be required. If the enforceability of the

agreement is to be determined with all other issues in the litigation, the parties will likely need 10 days of trial time and are unlikely to be able to reset this trial until 2022. I find that determining the enforceability of the agreement in advance of the other issues is an efficient means to advance the litigation, which has the potential to save significant time if the respondent is successful and does not prejudice the remaining issues if the respondent is unsuccessful.

[35] The burden of proof that a severance order should be made is on the applicant. In *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2009 BCSC 1592, the Court stated:

[20] As I have noted, the burden of proof is on the defendants to demonstrate that there is a real likelihood of savings in time and expense if severance is granted. No evidence of such savings has been adduced by the defendants. They rely instead on the "self evident" proposition that a trial that involves liability only will be shorter than a full trial, and that limited document production, (if indeed an order were to be granted to that effect), will cost less than comprehensive document disclosure. While it is preferable for an applicant to provide evidence to demonstrate how much time and money could be saved through severance, I am of the view that a failure to do so is not an absolute bar to the exercise of the Court's discretion. There may be cases in which the issues, evidence and arguments have been so concretely described that the Court may be satisfied from that information alone that time and expense will be saved, even though evidence of the precise number of days and dollars is not available.

[21] In the present case, where a full trial is estimated by the plaintiffs to be five days and by the defendants to be eight days, there does not appear to be great scope for savings in trial time if the quantum of damages is set aside for a separate hearing. There are compelling arguments against limiting document production or examination for discovery to liability issues, therefore the potential for a reduction of pre-trial expense is also questionable.

[36] In *Biggs v. ICBC*, 2008 BCSC 1343 at para. 16, Justice Holmes (as she then was) stated:

Even if a case need not be exceptional to support an order for severance, it must disclose some compelling reason for such an order. Compelling reasons must arise from the circumstances of the particular case I am not persuaded that, in the context of the litigation as a whole, they support a departure from the general practice by which all issues are determined in a single trial"

[37] The circumstances before the Court differ significantly from those in *Hudema*. In *Hudema*, the agreement stated the parties were not in a marriage-like relationship. One of the issues in *Hudema* concerned the validity and enforceability of the agreement. Justice Baker held that determining the enforceability of the agreement would either finally determine the matter or encourage the parties to settle.

[38] The matter in this case is more complex, raising significant issues such as the settlement and the \$250,000 payment going to the root of the Separation Agreement and its enforceability. If the Separation Agreement is upheld, a severed hearing will raise matters

that will be part of the assessment of the fairness of the Separation Agreement and the remedies sought. I am satisfied the issues are inextricably intertwined and involve overlapping evidence and disclosure. In addition, the full trial is set for nine days. The estimated time to try the issue of enforceability is five days. The proposed savings are four days. I am not satisfied that significant savings will result.

[39] Duplication of the evidence given at a severed hearing regarding the enforcement of the Separation Agreement would occur at trial if the Separation Agreement were upheld. All of the evidence should be heard at the same time. The facts are interrelated to such an extent that repetition is inevitable. The facts regarding the enforceability of the Separation Agreement cannot be separated. The evidence is complex and conflicting. There are issues of credibility that could result in conflicting findings.

[40] The applicant has not met the onus required. The application for severance is dismissed.

Document Production and Further Discovery

[41] The plaintiff seeks these orders:

- a) That AGB Properties Ltd., Gabriella Maria Bekes, in her capacity as Trustee of the Bekes Family Trust, in her capacity as Trustee of the Albert Bekes Joint Spousal Trust, and in her personal capacity, produce to the Plaintiff in this action the Examination for Discovery transcript of Andrew Dean Csaba Bekes in Supreme Court Action 18 9270 within 14 days of this order.
- b) That AGB Properties Ltd., Gabriella Maria Bekes, in her capacity as Trustee of the Bekes Family Trust, in her capacity as Trustee of the Albert Bekes Joint Spousal Trust, and in her personal capacity, produce to the Plaintiff in this action the Settlement Agreement in Supreme Court Action 18 9270 within 14 days of this order.
- c) The Defendant, Andrew Barton Csaba Dean Bekes, produce the Bare Trust Agreement for the property located at 2640 Estevan Avenue, Victoria, B.C. within 14 days of this order.
- d) The Defendant, Andrew Barton Csaba Dean Bekes, produce copies of all bank statements from his BMO USA account within 14 days of this order.
- e) The Defendant, Andrew Barton Csaba Dean Bekes, produce the tenancy agreement for the property located at Unit 150 - 3825 E Camelback Road, Phoenix, Arizona, U.S.A. within 14 days of this order.
- f) The Defendant, Andrew Barton Csaba Dean Bekes, produce all residential tenancy agreements for the property located at 117 Superior Street, Victoria, B.C. within 14 days of this order.
- g) The Defendant, Andrew Barton Csaba Dean Bekes, attend a further examination for discovery for up to 5 additional hours at a date and time mutually convenient to the parties and their counsel.

h) Costs of the application to be paid forthwith.

[42] As noted, AGB and Ms. Bekes as Trustee and in her personal capacity take no position respecting orders (a) and (b). The defendant however opposes the production of the discovery transcript and the settlement agreement in the Bekes Litigation. He also opposes the remaining orders sought respecting document production and the additional five hours sought for his examination for discovery.

Disclosure of Transcript for Discovery in the Bekes Litigation

[43] The plaintiff submits the transcript of the defendant is relevant because during his discovery, the defendant denied that the allegations in the Bekes Litigation were true and refused to say how he obtained his now substantial assets and what the settlement with AGB was. The relevance claimed is that during the settlement negotiations it was represented that the defendant had no interest in AGB or the Bekes Family Trust, that the Trust was discretionary and that the Trustee was not going to transfer to him any of those assets. However, the defendant has substantial assets that purportedly did not exist at the time of the Separation Agreement but now do, and no explanation has been provided for how they were acquired.

[44] The defendant submits the request for the transcript is irrelevant and overbroad. He submits his examination for discovery will not enable the plaintiff to advance her claim or damage his own claim given the Bekes Family Trust deed makes clear it was a discretionary trust and he had no interest in it. He argues that the grounds for establishing the Separation Agreement was significantly unfair are found in s. 93(3) and (5) of the Family Law Act, S.B.C. 2011, c. 25 [FLA]:

93(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
- (c) a spouse did not understand the nature or consequences of the agreement;
- (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

[45] The defendant submits that:

- a) the Separation Agreement dealt with the Trust in recitals I to L, stating that the Trustee controlled the Trust absolutely;

- b) neither party had independent information regarding the Trust;
- c) they could have met with legal counsel for the Trust but did not; and
- d) any interest of the defendant in the Trust was excluded property.

[46] Further, the defendant submits that the Separation Agreement also noted that the plaintiff was accepting the Separation Agreement as a final settlement. The defendant submits the plaintiff was entitled to seek discovery and other legal means to obtain more information, but she chose not to. She also specifically waived any interest she might have in the Trust.

[47] As a result, he submits the transcript is not relevant to the issue of enforceability. He further submits the transcript is not relevant to any purported vulnerability nor to any purported lack of understanding of the Separation Agreement. Finally, he argues that any allegation of the defendant committing perjury or fraud is not relevant as the Separation Agreement specifically provided for his potential interest in the Trust.

[48] Section 93(5) of the FLA provides:

- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.

[49] The defendant submits the transcript has no relevance to the grounds on which the Separation Agreement may be set aside.

[50] The defendant further submits that even if parts of the transcript are relevant, it is doubtful the complete transcript is relevant, hence to order disclosure of the complete transcript would be overbroad.

[51] The defendant also submits the transcript is protected by the implied undertaking of confidentiality, referring to *Juman v. Doucette*, 2008 SCC 8:

25 The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. The general idea, metaphorically

speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.

27 For good reason, therefore, the law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature)

36 On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. See, e.g., *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49 (F.C.T.D.), at p. 51. In *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (S.C.J.), the court held that a non-party to the implied undertaking could in unusual circumstances apply to have the undertaking varied, but that relief in such cases would virtually never be given (p. 130).

The Balancing of Interests

38 As stated, the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an undertaking should only be set aside in exceptional circumstances. In what follows I do not mean to suggest that the categories of superior public interest are fixed. My purpose is illustrative rather than exhaustive. However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside.

[52] While at the time the Separation Agreement was negotiated the existence of the Trust was known, the thrust of the plaintiff's claim is the defendant had a claim he intended to advance despite the discretionary nature of the Trust. The plaintiff submits that was not disclosed to her; indeed, the contrary was asserted. The defendant now denies that his notice of civil claim in the Bekes Litigation was accurate or correct.

[53] As noted in *Juman*, where an examinee has given contradictory testimony about the same matter in another proceeding the implied undertaking rule will no longer be a shield as "the deponent's privacy interest will yield to a higher public interest where the deponent has given contradictory testimony about the same matters in successive or different proceedings": para. 41.

[54] In this instance, the defendant commenced the Bekes Litigation in which he made a number of assertions relevant to his representations regarding the parties' Separation Agreement. He now asserts in this matter that such allegations are not true. Presumably his examination for discovery in that action may differ from his evidence at the time of the Separation Agreement that he had no interest in the Trust.

- [55] A party is not to be permitted to "tailor his evidence to suit his needs in each particular proceeding": Juman at para. 41.
- [56] In the Bekes Litigation, Part 1 of the statement of facts in the notice of civil claim is approximately 10 pages long and consists of 68 paragraphs that provide a factual background and detailed history of the defendant's contributions to AGB and the Trust and the basis for his claim of entitlement.
- [57] I conclude the portions of the transcript that support the defendant's claim against the Trustee for a share of the Trust are relevant to these proceedings to address the apparent inconsistencies in the defendant's position regarding his interest in the Trust as compared to the evidence provided and relied upon at the time of the Separation Agreement. Those portions of the transcript are ordered disclosed. As noted, the other party in the Bekes Litigation takes no position other than that if the transcript is disclosed it shall be kept confidential and only used in this proceeding.

Settlement Privilege Relating to the Settlement Agreement

- [58] Settlement Privilege belongs to both parties to a settlement agreement. One party cannot unilaterally waive the privilege: *Ross River Dena Council v. Canada* (Attorney General of Canada), 2009 YKSC 4 at para. 51, *aff'd* 2009 YKCA 8. The defendant opposes release of the settlement agreement in the Bekes Litigation (the "Settlement Agreement") based on settlement privilege. The plaintiff submits it falls within exceptions to settlement privilege.
- [59] In *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, the Court addressed the settlement privilege rule of evidence:

31 Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315.

- [60] In *Histed v. Law Society of Manitoba*, 2005 MBCA 106, Steel J.A. of the Manitoba Court of Appeal held:
37. The protection afforded settlement communications is less stringent than that afforded solicitor-client privilege. It is not considered a substantive rule of law or a fundamental civil right. Consequently, a court will more likely carry out a balancing of interests to determine whether the circumstances justify a demand for production or, in our case, justify straying from the open court policy.

- [61] The Separation Agreement signed in May 2017 left the defendant with minimal assets. In his current financial statement, he now reveals assets valued at about \$3,000,000. On discovery he refused to disclose what amount he received under the Settlement Agreement and refused to say how he obtained his now significant assets. The likely source is believed to be the Trust as no other explanation is in evidence.
- [62] *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, addressed the issue of possible exceptions to such confidentiality:
- [20] To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both relevant, and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice.
- [21] Some authorities appear to find exceptions to settlement privilege on the basis of relevance alone (see *Hudson Bay Mining and Smelting Co.*, *supra*). However, mere relevance does not provide a sufficiently high threshold to displace the compelling public policy underlying settlement privilege. As indicated by Chief Justice McEachern in *[Middlekamp]*, *supra*, through his reference to our "almost slavish adherence to the Peruvian Guano principle," the threshold for relevance on discovery is a low one indeed.

See also *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 19.

- [63] In *Stancor Enterprises Ltd. v. Fiorvento*, 2022 BCSC 1842, Justice Veenstra addressed such circumstances:
97. In *Unilever plc v. The Procter & Gamble Company*, [2000] 1 W.L.R. 2436 (C.A.), cited with approval in both *Dos Santos* and *Sable Offshore Energy*, Robert Walker LJ identified at para. 23 eight of what he described as "among the most important instances" of exceptions to privilege. They include where necessary to prove an agreement reached in the course of a without prejudice negotiation, to explain delay or acquiescence, where there is a reservation of the right to bring a matter to the attention of the courts on questions of costs, and the following:
- (2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.
- ...
- (4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in *Foster v Friedland*, 10 November 1992,

CAT 1052). ... this court has, in *Foster v Friedland* and *Fazil-Alizadeh v Nikbin*, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

[64] As noted, while the defendant opposes production of the Settlement Agreement, the other party to it does not.

[65] The public policy underlying the rule "requires that the rule not operate to shield evidence of misrepresentation or of dishonest dealing": *Bertram v. Canada*, [1996] 1 F.C. 756 at 757, 1995 CanLII 3563 (C.A.). The Court in *Bertram* also stated at 767:

Finally, in *Middelkamp v. Fraser Valley Real Estate Board*, McEachern C.J.B.C., speaking for four of the five judges of the British Columbia Court of Appeal, said:

Considering the enormous scope of production which is required by our almost slavish adherence to the Peruvian Guano principle, the questionable relevance and value of documents prepared for the settlement of disputes, and the public interest, I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket", prima facie, common law, or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.

In my judgment, this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.

I recognize that there must be exceptions to this general rule. An obvious exception would be where the parties to a settlement agree that evidence will be furnished in connection with the litigation in which the application is made. In such cases, the public interest in the proper disposition of litigation assumes paramountcy and opposite parties are entitled to know about any arrangements which are made about evidence. Other exceptions could arise out of such matters as fraud, or where production may be required to meet a defence of laches, want of notice, passage of a limitation period or other similar matters which might displace the privilege. As we did not have argument on these matters I prefer to say nothing further about them. [Emphasis added.]

[66] Unlike cases where the issue arises in subsequent litigation, in the proceeding settled here the waiver relates to a separate proceeding in which it is alleged the defendant misled the Trustee and is now seeking to avoid disclosure of the Bekes Litigation and its settlement in order to mislead the plaintiff.

[67] The plaintiff submits disclosure of the Settlement Agreement is necessary and relevant. The plaintiff argues that her entitlement in this litigation cannot be determined without knowing the defendant's settlement. Further, the plaintiff submits that disclosure is required in light of the defendant's discovery evidence to address the inconsistencies between what the defendant told the plaintiff before they settled and his claims of a secret trust and promise from his late father regarding his interest in the Trust.

[68] In *Sable* the Court stated at paragraph 19:

19 There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

[69] The plaintiff submits there have been significant misrepresentations by the defendant that justify disclosure in this instance.

[70] In *Stancor* the limited nature of exceptions to the privilege was addressed:

139 Unilever plc emphasizes the limited nature of the exceptions. The recognized exception that comes closest to the circumstances at play in the present case is the fourth of the exceptions listed there. I repeat what Robert Walker LJ said about that exception at para. 23:

(4) ... one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" ... But this court has ... warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

[Emphasis added.]

140 Within the same category would fall the exceptions for threats, the governing principles of which were reviewed by the Master at paras. 41-46 of the judgment under appeal. The Master referenced paras. 12 and 16 of *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2006 BCSC 1190:

[12] In order to find that a communication is exempt from settlement privilege, it is not enough to characterize it as a threat. Rather, it must be of such a character that the public interest in its disclosure outweighs the public interest in protecting settlement communications.

...

- [16] Privilege is lost not by making a threat, but by threatening to do something of an egregious nature. For example, a threat to commence an action or to bring a motion does not destroy the privilege attaching to a settlement communication. On the other hand, a threat to commit perjury is not privileged: see *Greenwood, Berry*. The communication in issue here is much closer to the former examples than to the latter one.
- [71] The plaintiff submits the defendant has, based on his discovery evidence, filed false claims in the *Bekes* Litigation. She submits he should not be protected by settlement privilege in such circumstances and that it is in the public interest that such dishonesty be prevented. She relies as well on *Berry v. Cypost Corp.*, 2003 BCSC 1827, where Justice Burnyeat granted a partial exemption from the privilege where an allegation of a false affidavit arose. Justice Burnyeat noted:
- [25] I am satisfied that the public policy behind the inadmissibility of without prejudice discussions is to encourage the worthwhile endeavour of honest attempts at settlement and not for some other purpose. It can not be the case that an admission that a false affidavit had been sworn would be protected by the privilege associated with any honest attempt at settlement. At the same time, settlement discussion should not be allowed to make inadmissible a statement which may well go to proving the very issue which will determine the outcome of the action between the parties - whether or not the Employment Agreement was actually signed by Mr. Berry.
- [26] I am satisfied that the potential ability to provide that a party in the proceedings has sworn a false affidavit is critical to the question of the credibility of that party in this action, the ultimate determination of the issues between the parties will depend on findings respecting the credibility of the parties .
- [72] There is a prima facie indication that there was a misrepresentation by the defendant to the plaintiff leading to the Separation Agreement. As noted in *Bertram* at 765, "the public policy which underlies the exclusionary rule requires that that rule not operate to shield evidence of misrepresentation or of dishonest dealing". The Court in *Bertram* further noted at 768 that "[t]he purpose of the rule, however, is not to protect dishonest dealing and there is no policy reason for excluding what one party puts forward in its own interest and to the prejudice of the other".
- [73] A loss of privilege is to be narrowly construed. The plaintiff seeks production of the Settlement Agreement. At issue is the alleged undisclosed interest of the defendant in the Trust at the time the Separation Agreement was finalized. The representations allegedly made to mislead, and their surrounding circumstances, are to be disclosed. The issue that then arises is the breadth of such disclosure. The plaintiff seeks the disclosure of the Settlement Agreement in its entirety, which presumably will include references to the actual amount of the settlement.

- [74] As submitted by the plaintiff, the amount of the settlement, if the Separation Agreement is set aside or varied, will be relevant to division of family assets, assuming the Trust is found to be such.
- [75] It is of note the defendant in the Bekes Litigation takes no position regarding the requested disclosure and the loss of privilege. While that is not determinative given the privilege is that of both the defendant here and the defendant in the Bekes Litigation, it is relevant that the defendant, the alleged misrepresenting party, is the one opposed and who presumably will benefit if the privilege is not lost.
- [76] In conclusion, I am satisfied that in these circumstances there is a strong public policy reason for disclosure that outweighs the policy of promoting settlement.
- [77] I turn next to the issues of the disclosure sought respecting various documents and the request for a further examination for discovery.

Document Disclosure - Other Documents

- [78] As noted in the orders sought, the plaintiff seeks the production of four specific documents:
- a) A bare trust agreement for property at 2640 Estevan Avenue, Victoria, B.C.;
 - b) Copies of all of the defendant's bank statements for his BMO USA account;
 - c) The tenancy agreement for property at Unit 150-3825 E. Camelback Road, Phoenix, Arizona; and
 - d) Copies of all residential tenancy agreements for property at 117 Superior Street, Victoria, B.C.
- [79] Under R. 9-1 a party must provide a list of documents that lists "all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact". Under R. 9-1(7) and (8) a party can demand documents including additional documents that relate to "any or all matters in question in the family law case": R. 9-1(8)(b).
- [80] The defendant opposes disclosure on the basis the plaintiff has not provided a basis for disclosure of such documents or any evidence regarding their potential relevance, relying on R. 9-1(8). Specifically, the defendant submits that R. 9-1(8) requires some evidence be provided regarding the existence of such documents and their potential relevance, citing *Sarmadi v. Bagherzadeh*, 2021 BCSC 1967, where Master Bilawich noted:

34 Sub-rule (8) allows a party who believes the list should include documents or classes of documents that are within the listing party's possession, power or control, which related to any or all matters in question in the case and which are additional to what is required under sub-rule (1) to make written demand which identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed.

[81] The plaintiff has not complied with R. 9-1(8). Reasons have not been provided by the plaintiff for the documents requested.

[82] As noted by Justice Fitch (then of this Court) in *Lit v. Hare*, 2012 BCSC 1918:

[65] Compliance with R. 9-1(7) and (8) of the SCFR (and its equivalent in the SCCR, R. 7-1(10) and (11)) is not optional and failure to observe its requirements will not readily be forgiven. I do not read *Przybysz* as suggesting otherwise, nor do I think that it particularly assists the applicant in this case. In fact, the case sounds a clear cautionary note about the failure to observe the requirements of this Rule. While I note that in *Balderston v. Aspin*, 2011 BCSC 730 [*Balderston*], a similar application for document production was entertained on its merits in the face of non-compliance with the companion civil rule, that was a case where no objection was taken by the party from whom additional documents were sought. The parties in that case essentially agreed to proceed on the basis that the request for the listing and/or production of additional documents had been made and declined.

[66] Further, I do not accept the applicant's contention that requests for documents made in the context of examinations for discovery or the filing of the application itself should be regarded as sufficient substitutes for compliance with the terms of the Rule itself. While granting relief from non-compliance may, at first blush, seem expedient, doing so without good cause may also work to undermine the important objectives the Rule is designed to foster.

[67] The Rule is designed to promote dialogue between the parties, informal resolution of document production disagreements where that is possible and, where it is not, targeted litigation that focuses on those well-defined issues that remain contentious. The Rule operates to restrain the impulse to litigate document production issues as a course of first resort where those issues might be resolved through discussion, including by requiring the parties to articulate and defend their respective positions. In my view, the Rule is also designed to facilitate the adjudicative process by narrowing the issues and argument and particularizing, to the extent possible, the documents or categories of documents sought before an application is made. As Master Bouck observed in *Balderston*, at para. 29, in the context of the SCCR:

The intent of Rule 7-1(11) is to inform the opposing party of the basis for the broader disclosure request in sufficient particularity so that there can be a reasoned answer to the request. The Rule allows the parties to engage in debate or discussion and possibly resolve the issue before embarking on an expensive chambers application.

- [83] The three real properties noted are disclosed by the defendant in his F-8 financial statement as his assets under the heading of business interests. The Estevan Avenue property is owned in joint tenancy with Marie Sophie Bekes but is subject to a bare trust agreement. It and the Superior Street property in Victoria and the Phoenix property are apparently registered to the defendant's company 125872 B.C. Ltd. (dba AQP Investments Inc.). The incomes earned by the Superior Street property and the Phoenix property are disclosed in the company's financial statement. That would include rental income in any event. As no demand pursuant to R. 9-1 provides a reason for the production of the bare trust agreement and the rental agreements, the requests fail.
- [84] Likewise, the application for the BMO USA account bank statements fails due to the lack of a demand specifying why they are relevant to the litigation and providing the reason for production.

Examinations for Discovery

- [85] Ms. Horton conducted an examination for discovery of the defendant on September 15, 2022 that lasted for five hours. She seeks an order that the defendant attend a further examination for discovery for up to five hours. The defendant has offered to attend such a discovery for up to two hours. However, the defendant opposes the five hours sought, submitting that the plaintiff failed to focus on issues of enforceability of the Separation Agreement and instead sought to uncover financial information going back to 2010.
- [86] The plaintiff alleges that during the examination for discovery, the defendant had difficulty understanding many of the questions and took an inordinate amount of time to answer and asked for the questions to be repeated several times.
- [87] A review of portions of the examination for discovery provided shows that at times the defendant sought justifiable clarification of questions. I am not satisfied the transcripts establishes the alleged "inordinate" time taken to answer.
- [88] Rule 9-2(2) and (3) of the Supreme Court Family Rules provides:
- (2) Unless the court otherwise orders, the examinations for discovery, including all examinations under subrules (16), (18) and (20), conducted under this rule of a party, including any such examinations conducted of a person referred to in subrule (1)(b) who is examined in relation to that party, by any other party who is adverse in interest must not, in total, exceed in duration
- (a) 5 hours, or

- (b) any greater period to which the person to be examined consents

Considerations of the court

- (3) In an application under subrule (2) to extend the examination for discovery period, the court must consider the following:

- (a) the conduct of a person who has been or is to be examined, including

- (i) the person's unresponsiveness in any examination for discovery held in the family law case,

- (ii) the person's failure to provide complete answers to questions, or

- (iii) the person's provision of answers that are evasive, irrelevant, unresponsive or unduly lengthy;

- (b) any denial or refusal to admit, by a person who has been or is to be examined, anything that should have been admitted;

- (c) the conduct of the examining party;

- (d) whether or not it is reasonably practicable to complete the examinations for discovery within the period provided under subrule (2);

- (e) the number of parties and examinations for discovery and the proximity of the various interests of those parties.

[89] Given the refusal of the defendant to answer certain questions and specific issues and areas of concern and in light of the disclosures required by these reasons, the plaintiff is entitled to further examine the defendant. I am satisfied that another three hours should be sufficient time to complete the discovery of the defendant and so order.

Orders

[90] The application to sever is dismissed.

[91] The portions of the defendant's discovery in the Bekes Litigation that relate to defendant's claim against the then Trustee for a share of the Trust are to be disclosed.

[92] The application for production of the Settlement Agreement is granted.

[93] The application for the specified remaining documents is dismissed.

[94] The costs of the two applications shall be costs in the cause.

"The Honourable Mr. Justice Punnett"

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